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THE ANCIENT RULE DENYING RECOVERY BY DRAWEE PAYING FORGED PAPER.

Late decisions have exhibited quite a frequency in reference to right of party paying forged paper. We discussed at page 417 of 70 Cent. L. J., the bearing of Negotiable Instruments Law on this subject, taking the view that St. Louis Court of Appeals was in error in holding that it bore upon the question at all. Again at page 139 of 71 Cent. L. J., we annotated the decision of another court holding that the maker paying a forged note as his own had no recourse on the innocent holder to whom he paid it.

The Supreme Court of Nebraska, in State Bank of Chicago v. First Nat. Bank of Omaha, 127 N. W. 244, follows the rule of Price v. Neal, 3 Burrows, 1355, saying, in a case where drawee bank paid a draft purported to be drawn by its correspondent bank in South Dakota, cashed by a Nebraska bank, that there was no recourse on the Nebraska bank.

It was remarked in the opinion that: "Counsel for the respective litigants stated at the bar, that the negotiable instruments law does not control this case, and we shall treat their statement as correct for the purposes of this case." This may lend some force to our suggestion in 70 Cent. L. J., *supra,* that this law ought to be amended in this particular.

This opinion also says: "The cases are annotated in a note to First National Bank v. Bank of Wyndmere, 15 N. D. 299, 10 L. L. R. A. (N. S.) 49, 125 Am. St. Rep. 588. Courts and text writers generally recognize that the preponderance of authority is in favor of the rule, but it seems in conflict with a well-established principle of law, that money paid by mistake may be recovered back, and has not been accepted without qualification by all of the American courts. North Dakota refuses to follow Price v. Neal. * * * The position assumed by North Dakota is in harmony with suggestions made by many text writers but so far as we are advised, not sustained by the opinion of any other court." As to this we refer to our annotation.

There seems to us little reason for adherence to the rule in Price v. Neal, "in conflict with a well-established principle of law," as above stated. The practice of banks is not to cash paper on other banks, unless they rely on the credit or standing of the payee therein or on that of someone vouching for him. If they do otherwise, it shows negligence. If they do rely as stated, they are presumptively able to save themselves against loss, if the paper is not honored.

What requirement then, of commercial dealing is there which should make a drawee bank suffer for a mistake in paying a forged check, if it acts within time to save the cashing bank from changing its position? In the rush of business a simulated signature upon an accustomed form might pass, and to say, that, not even by telegraphic advice, can such a mistake be corrected is a harsh and seemingly unnecessary rule. Conditions now and in 1562, when Lord Mansfield decided Price v. Neal, are vastly different. Time required for a return on a foreign bill was several times as great and no means of intercepting the delivery of proceeds were available. To ask for cash now instead of awaiting return ought to have other significance than formerly. The intervening period is too brief for any appreciable discount, and cashing a draft instead of awaiting return from collection is like a friendly accommodation, instead of a transaction of a purely commercial nature.

In the days of Lord Mansfield a bill held at one point and payable at another, whether it were payable on demand or at so many days after date or sight, might naturally be regarded as time paper.

It might well be thought then that the place of payment "is to be deemed the place of final settlement, where all prior mistakes and forgeries shall be corrected and settled

once for all; and if not noticed and payment is made, the money cannot be recovered back." But why should there exist an inflexible rule of this kind in these days?

As we have said, banks do not cash paper of this kind, except for collateral reasons. It is done either to accommodate a depositor or for other personal reason in no way connected with the transaction as a commercial transaction. In the days of Lord Mansfield the length of time for a return presented a basis for discount, so that in each instance there was as distinctly a banking proposition of purchase of paper and the earning of interest, as in the discount of a note to mature at a future time.

Furthermore, there would more certainly exist a presumption of irretrievable loss from lapse of time in Lord Mansfield's age than now, when no appreciable time intervenes.

The old phrase, called to the defense of the rule in Price v. Neal, that the drawee is bound to know the signature, of the drawer, has been twisted from its legal relation. The obligation is essentially one of contract, and, therefore, is confined to what is for the benefit of the drawer. No third party has any concern in that obligation. But the fact was more apparent in the time of Lord Mansfield, that he would know such signature than now.

In those days banks and transactions through them with remote places were greatly rarer than now, when facilities of quick transportation and immediate communication exist.

Such banks as had foreign correspondents were perhaps still rarer. Neither was forgery such a fine art as now, nor could the form and appearance of banking paper be so well simulated as now.

Then it would have been considered a most extraordinary thing for a forgery not to be detected at the place where a genuine signature existed. Now no special wonder would exist as to a paper coming through commercial channels, if a skillful forgery were successful.

We confess our sympathy with departure from a rule which all seem to agree is opposed to natural justice, because there is no such urgency for its enforcement as when it was announced.

To it the maxim may well apply *cessante ratione legis cessat ipsa lex.* 1 Hughes G. & R. of Law, sec. 54.

NOTES OF IMPORTANT DECISIONS

CARRIERS — PASSENGER ELEVATORS AS COMMON CARRIERS UNDER NEGLIGENCE RULE.—It seems to be the tendency of decisions to hold that a building, whether a hotel or office building, using an elevator for passengers is bound to the same degree of care as a railroad, steamboat, or stage coach. The Texas Civil Court of Appeals in Farmers' & Mechanics' Nat. Bank v. Hanks, 128 S. W. 147, is an illustration of this tendency.

This decision holds that a statute mentioning railroad, steamboat, stage coach "and other vehicle for the conveyance of goods or passengers" embraces "an elevator car in an office building habitually used for the transportation of passengers," and that "the reasons underlying the giving of damages" against what is specifically mentioned "apply with equal force" to the owner of such an elevator car.

It seems to us that the statute rather hinders than aids the conclusion reached, because in one respect at least the general words claimed to support it would seem limited by the maxim id omne genus. What were mentioned were common carriers. We doubt whether elevators in an office building are. We recognize that a common carrier must not necessarily hold himself out to the public in absolutely general way, but he may be such in the way limited, that is for carriage of specific things. But his customers need not have any prior relation with him or have their right to carriage of person or property depend upon some other antecedent or existing relation. This, however, does exist for right of carriage in an elevator. If one is a guest of a hotel, the elevator is for his convenience. So as to the tenant of an office building. In neither case are others entitled to use the elevator except for the presumptive benefit of the guest or tenant. The guest or tenant may be said to have purchased the elevator privilege. Others are licensees through such right. The invitation to the general public as to those not guests or tenants would appear to be thus limited. But, if

so, why should one such have any right against the elevator owner unless at least he go to a hotel or an office building upon the guest's invitation or tenant's business, or in furtherance, even though in a general way, of the guest's pleasure or the tenant's business? The case of Fraser v. Harper House Co., 141 Ill. App. 390, was in favor of a guest, and the distinction we discuss was not considered. The case of Sweden v. Atkinson Improvement Co. (Ark.), 125 S. W. 439, was that of an office building, and the rule was generally stated.

But whether the rule as to this strictness be limited to tenants and guests or not, there does not seem to have been any necessity for its announcement in the Hanks' case, as the plaintiff's son was working in the shaft of an elevator and was killed by a descending elevator. That was not a passenger case at all.

An elevator for hotels and office buildings is just a substitute for stairways. Its use is for convenience if there are also stairways, and we doubt greatly whether it would be held that the keeper of a stairway is bound to the same degree of care in its proper use as a railroad of its roadbed.

The case of Shattuck v. Rand, 142 Mass. 83, ruled that the owner of an apartment hotel was not liable for injuries sustained by the city shutting off the water, from elevator machinery, if he did not know and could not learn by the exercise of reasonable care that there was danger from its being shut off. Here the rule seems to be reasonable, not extraordinary care. It seems to us that something else is needed than the common law rule for that high degree of care applicable to common carriers.

OPEN ACCOUNT—BURDEN OF PROOF TO SHOW PAYMENT.—At page 100 of 71 Cent. L. J., we submitted note to the case of Pollak v. Winter, 51 So. 998, and now wish to add to that note the case of Parker v. Harrison, 129 S. W. 1026, decided by Springfield, (Mo.), Court of Appeals.

The facts in these two cases seem to be on all fours and the decisions squarely opposed.

The first sentence in the Pollak case says: "As a general rule the burden of proving a negative averment is not put upon the plaintiff, but this rule does not seem to prevail in actions upon an open account as distinguished from a stated or uncontroverted one and when suit is brought upon an open account the plaintiff does not overcome the burden by merely showing the rendition of service and the value of the same, but must offer some proof that it was not paid for when rendered or when due." Our note claimed that no such exception was well grounded.

In the Parker case there was a suit for attorney fees by administrator of decedent and proof rendition of services. "There was no evidence by either plaintiff or defendant tending to show whether or not" the services had been paid for. "At the close of the testimony the court gave instructions to the jury which placed the burden of proof upon the plaintiff to show that the deceased, Harrison, had not paid Parker."

Arguing, the opinion says: "There can be no question but that in the trial of a case, either for money had and received or for debt, where the plaintiff can show that the defendant received the money for the plaintiff, or defendant was indebted to plaintiff, this makes a prima facie case for the plaintiff and casts the burden of proof upon the defendant of showing that the money or the debt as the case may be, has been paid to the plaintiff."

This case published since our annotation, is so very apt, and the Alabama case seems so out of line with principle, that we think authority should be heaped up to stop, if possible, its harmful career.

MECHANICS' LIENS—THEIR ENFORCEMENT AGAINST PROPERTY AFFECTED BY A PUBLIC USE.—There exists something of contrariety in decision as to what constitutes a quasi-public corporation when the question is of acquiring an enforceable mechanics' lien against its property, where the statute does not specifically provide about this. But conceding the claim of exemption for a given corporation, its limitations are very interestingly treated by the Oregon Supreme Court in the case of Benbow v. The James Johns, 108 Pac. 634.

The James Johns is a ferry boat and a mechanics' lien for material and labor used in its construction by the contractors was being foreclosed by the subcontractors and its exemption was pleaded. The answer was demurred to and demurrer being overruled the action was dismissed. The supreme court reverses this decision.

The opinion says as to exemption because the property is affected with a public interest that: "There is sound authority for saying that it cannot be applied at all, except so far as the property has become entirely the property of the company divested of specific liens. When that has been accomplished, there may be reason in saying that a general creditor may not levy on or sell a part of the property of a company, which property is necessary to the carrying out of its assum-

ed obligations to the public. That is one thing; it is an entirely different thing to say that such a lien shall not attach when the company, by the very act of acquiring a particular article of personal property, creates either by contract, or by force of law, a specific lien in favor of the vendor or manufacturer, or would create it unless hindered by public policy." In this way it would seem that construction would differ from repair.

It is also said that if the lien once attaches subsequently devoting the property to a public use does not defeat the lien, though the work either of construction or repair was with the intention of so using the property. Many statutes prescribe definitely what public use shall prevent the attaching of a lien and in applying them the distinction between construction and repair is not observed, though it will hardly be claimed that subsequent devotion to public use would defeat a lien already subsisting.

VARIETIES OF CRITERIA OF GUILT IN OBSCENITY CASES.

A study of psychology, ethnography and juridical history in relation to modesty, reveals the fact that the statutory epithets "obscene and indecent," etc., do not in and of themselves furnish either uniform, or any criteria of guilt, such as should enable every man of ordinary understanding, under all circumstances to know with certainty whether or not his proposed conduct is penalized, and without which certainty in the criteria of guilt no penal statute can be "due process of law." (See my essays in numerous law and medical journals).

It remains to inquire how far the unconstitutional judicial legislation in the creation of criteria of guilt has supplied the necessary certainty in the tests of obscenity. That this is not accomplished is the opinion of hundreds who have been convicted for a mere difference of opinion with the censors, as it seemed to them, and some of these have left valuable and intelligent protests. But these are not alone.

At the National Liberal League's convention held in Philadelphia July 1st to 4th, 1876, the following resolution was adopted:

"Resolved, That the league, while it recognizes the great importance and the absolute necessity of guarding by proper legislation against obscene and indecent publication, whatever sect, party, order, or class such publications may claim to favor, disapproves and protests against all laws which by reason of indefiniteness or ambiguity, shall permit the prosecution and punishment of honest and conscientious men for presenting to the public what they deem essential to the public welfare, when the views thus presented do not violate in thought or language the acknowledged rules of decency; and that we demand that all laws against obscenity and indecency shall be so clear and explicit that none but actual offenders against principles of purity shall be liable to suffer therefrom."[1]

The annual meeting of the National Purity Federation, October 11, 1906, unanimously adopted a resolution praying for relief from the evils of this uncertainty. From the preamble of this resolution I quote the following: "In view, however, of the fact that purity workers are constantly placed in jeopardy because of the uncertainty of the judicial test of obscenity and because these laws have in some instances been made the means of injustice and cruel wrong; and in view of the fact also that the indefinite character of the law renders it is impossible for anyone to know whether he is acting within the law or is violating the law, and because the law has been made a menace and a hindrance to many earnest workers whose efficient help is most seriously needed," etc.[2] Similar resolutions complaining of the uncertainty of the law and offering definite suggestions for amendment were adopted by the joint session of the Medical and Surgical Section of the State Medical Society of Illinois.[3]

The foregoing statements are entitled to great weight because in each case they come from persons who expressly approve the general purposes of the laws in ques-

(1) Comstock's Frauds Exposed, page 446.
(2) The Light, Nov., 1906.
(3) Medical Record, Oct. 12, 1907, p. 599-600.

tion, and their complaints are in the nature of an admission against interest.

Lawyers have also noted the difficulty of knowing what is penalized. Thus Edward Livingston, one of the greatest lawyers of his time,[4] while revising the penal code of Louisiana, when he came to that class of offenses against "morals" wrote to a distinguished colleague, thus: "There is another evil of no less magnitude, arising from the difficulty of defining the offense. Use the general expression of the English law, and a fanatic judge with a like-minded jury, will bring every harmless levity under the lash of the law. Sculpture and painting will be banished for their nudities, poetry for the warmth of its descriptions, and music if it excites any forbidden passion, will hardly escape."[4a]

A noted English law-writer makes this comment: "It is impossible to define what is an immoral or obscene publication. To say that it necessarily tends to corrupt or deprave the morals of readers, supplies no definite test."[5]

There is also judicial admission, to the uncertainty and consequent arbitrariness of the statute. Thus it is said "the law is arbitrary."[6] In a concurring opinion in the leading English case this language is used: "Therefore it appears to me very much *a question of degree*, and if the matter were left to a jury, it would *depend very much on the opinion which the jury might form of that degree* in such a publication as this."[7] One American court speaks of "the elasticity of the language used by Congress, necessarily (?) so general in its description of the offense.[8] Another court admits that, "Whether act or language is obscene depends upon circumstance,"[9] which circumstances, however, are not defined in the statute. Again it is declared: "The views that different persons might entertain of the tendency and effect of such publications *are so various* that these questions ought to be submitted to a jury,"[10] and so instead of being a matter of statute law every case in effect "is one which addresses itself largely to your (the jurors) good judgment, common sense and knowledge of human nature and the weakness of human nature."[11] The same thought comes from another court. "Now what are obscene, lascivious, lewd or indecent publications is largely *a question of your own conscience and your opinion*,"[12] and not a matter of a statutory definition. "The question whether the contents of the publication in question come within the prohibition of the statute is one upon which *there might be a difference of opinion*,"[13] because the statute has not defined the crime. Again: "The question of obscenity in any particular article *must depend largely on the place, manner, and object* of its publication,"[14] but how, and why, these control is nowhere defined with any precision. "It is wholly unimportant what may have occurred elsewhere in the consideration of this question,"[15] because there is no common standard of judgment binding upon all federal courts. Another court declared: "Obscenity is determined by the common sense and *feelings* of mankind and not by the skill of the learned,"[16] nor by the statutes or even the judge-made tests.

Even the judicial legislation has not improved matters. The words "obscene, indecent," etc., "cannot be said to have acquired any technical significance."[17] The same comes from another court: "It would therefore appear that the term 'public decency' has no fixed legal meaning, is

(4) See Columbia Law Review, p. 32, Jan., 1902.

(4a) Life of Edward Livingston, by Chas. Haven Hunt, p. 289.

(5) Patterson, Liberty of Press and Speech, p. 70.

(6) U. S. v. Harmon, 45 Fed. Rep. 421.

(7) Queen v. Hicklin, L. R. 3 Q. B. 378.

(8) U. S. v. Davis, 38 Fed. Rep. 327.

(9) U. S. v. Smith, 45 Fed. Rep. 477.

(10) U. S. v. Clarke, 38 Fed. Rep. 502.

(11) U. S. v. Clarke, 38 Fed. Rep. 734.

(12) Instruction approved in Dunlop v. U. S., 165 U. S. 500.

(13) In re Coleman, 131 Fed. Rep. 152.

(14) U. S. v. Harmon, 38 Fed. Rep. 829.

(15) U. S. v. Sherman, unofficially reported by Mr. Comstock in Morals, not Art or Literature, p. 33.

(16) Commonwealth v. Landis, 8 Phila. 453.

(17) U. S. v. Harmon, 45 Fed. Rep. 417.

vague and indefinite."[18] And so after all the judicial legislation in aid of the statute, "The word (obscene) cannot be said to be a technical term of the law, *and is not susceptible of exact definition in its juridical uses.*"[19]

However, it may be suggested that all this admitted uncertainty is due to uncertainty of evidence and not to the uncertainty of the law. It has been shown that the statutory words do not furnish any definite criteria of guilt, and that often the practical operations of the statute is to produce contradictory results when applied by different courts to the same subject matter. It remains to show by a comparison of the judicial legislation creating criteria of guilt, that these are so conflicting as to leave undiminished the uncertainty as to what are the standards of judgment. It is quite apparent that the tests of obscenity are determined by the necessities of each case, and adjusted to accomplish the judicial desire, predetermined by consideration other than those expressed in the statute and derived from mere moral sentimentalism and feeling convictions. Even when taken separately the judicial tests of obscenity are as uncertain as the statute upon which they engraft unconstitutional amendments under the pretense of interpretation. Taken collectively they leave us in a worse muddle than could have been imagined from a mere reading of the statute.

Fact or Law?—"Whether obscene or not is *a question of law* and not of fact; that the question is for the court to determine and not for the jury."[20] But it is also held that the pictures "should be exhibited to the jury for them to determine as *a matter of fact* in the exercise of their good sense and judgment whether or not they were obscene or indecent."[21] Then again, there is this middle ground: "The judge may rightfully express his opinion, respecting the evidence and it may sometimes be his duty to do so, yet *not* so as to withdraw it from the consideration and decision of the jury."[22]

But this further modification has been made: "Rather is the test what is *the judgment of the aggregate sense of the community* reached by it."[22a] "It is a question for the jury to pass upon under proper instructions."[23]

Is the Statute Tautological?—It has been said that, "Obviously the words 'obscene' and 'of an indecent character' are treated in this opinion[24] as *convertible* expressions, equivalent in meaning."[25] So also: "The word, "lascivious is very nearly *synonymous* with the word 'lewd;' so nearly so that I will not undertake to draw a distinction between the two words."[26] But, on the other hand, it has been said, "The words 'obscene,' 'lewd' and 'lascivious' as employed in the statute *are not used interchangeably.*"[27]

May Comparisons Be Made?—The following instruction has been held good: "You (jurors) are not sent here to try other books *nor to compare this book with other books*, and you heard the court rule out all other books."[28]

On the other hand, the following instruction has been given: "So far as your ex-

(18) McJunkins v. State, 10 Ind. 145.

(19) Timmons v. U. S., 85 Fed. Rep. 205.

(20) McNair v. People, 89 Ill. 443; U. S. v. Bennett, Fed. Case No. 14571, p. 1099; U. S. v. Shepard, 160 Fed. Rep. 584 (Utah). Trial court directed a verdict of guilty (Exam. C. C. A. decision.)

(21) People v. Muller, 32 Hun, 211.

(22) Commonwealth v. Landis, 8 Phila. 453. "Ordinarily it is a question for the determination of a jury. But it is within the province of the court to construe the objectionable document so far as necessary to decide whether a verdict establishing its obscenity would be set aside as against evidence and reason." U. S. v. Smith, 45 Fed. Rep. 477. "The ultimate solution of that question rests with the jury to the same extent that in civil prosecutions for libel, and in criminal prosecutions since the declaratory act of the 32 Geo. III., c. 60. U. S. v. Clarke, 38 Fed. 501; U. S. v. Harmon, 45 Fed. Rep. 418.

(22a) U. S. v. Harman, 45 Fed. Rep. 417.

(23) U. S. v. Moore, 129 Fed. Rep. 161, 163.

(24) 165 U. S. 311.

(25) Timmons v. U. S., 85 Fed. Rep. 205.

(26) U. S. v. Clarke, 38 Fed. Rep. 733.

(27) U. S. v. Smith, 45 Fed. Rep. 477; U. S. v. Bennett, Fed. Case No. 14571, 16 Blatch. 338; U. S. v. Britton, 17 Fed. Rep. 733; U. S. v. Males, 51 Fed. Rep. 42.

(28) U. S. v. Bennett, Fed. Case No. 14571, p. 1105.

perience goes the effect that Shakespeare's writing or any other author's writings, have had in the world, notwithstanding certain passages that they contain, you have the right to resort to that experience in determining what will be the probable effect of the publication involved in this case, *provided you think such comparison*, or reference to such experience will be of service and will aid you in reaching a correct conclusion."[29]

Does Deposit Complete the Offense?—It has been held that "The act of depositing (obscene matter in the mails) must be held to constitute the entire offense."[30] On the other hand it has been said: "The statute does not make criminal the mere depositing in a post office of obscene matter, even though it be 'knowingly' deposited."[31]

Contradiction as to "Knowingly" in Indictment.—"It (the indictment) is defective because it does not allege that the defendant knew that the writings, papers, etc., which she is charged with having deposited in the mail, for mailing and delivery, were of an obscene, lewd, and lascivious character."[32]

But observe contra: "The indictment alleges that the defendant knowingly deposited this non-mailable picture. * * * Believing that the defendant was fully informed of the matter charged against him, notwithstanding the cases cited to me of Com. v. Boynton, 12 Cush. 499; U. S. v. Slenker, 32 Fed. Rep. 691, I am constrained to hold that this indictment is sufficient."[33]

Evidence Aliunde.—If the terms employed do not in and of themselves reasonably convey the *suggestion* of obscenity, lewdness or lasciviousness, they cannot be eked out by evidence aliunde.[34]

As to Obscenity on Suspicion.—Indictment on letter from a married man to an unmarried woman inviting her to visit a neighboring city with him clandestinely, the purpose of the visit not being disclosed in the letter, and it was free from immoral language. "The court cannot see how any other construction can be put upon them than that they are within the meaning of the statute. * * * It is difficult to conceive what can be more shocking to the modesty of a chaste and pure-minded woman than the proposition contained in these letters."[35] But in a similar case a "letter free from the immoral language inhibited by the statute, written apparently for the purpose of seduction or assignation" produced the following opinion: "For a letter to be obnoxious to this statute *its language must be obscene*, lewd or lascivious and it must be of indecent character. The statute does not declare that the letter must be written for an obscene or indecent purpose, but that the letter itself, in its language shall not be of indecent character. When a law denounces a letter containing obscene language, and does not denounce a letter decent in terms but written for an indecent purpose, an indictment founded only upon the obscene purpose cannot be maintained."[36]

Whose Opinion, the Juror's, the Public's or the Pure?—"Sitting as the court does in this case, in the stead of the jury, it may not apply to the facts its own method of analysis or process of reasoning as a judge, but should try to reflect in the findings the common experience, observation, and judgment of the jury of average intelligence."[37] Here then, a judge with

(29) U. S. v. Clarke, 38 Fed. Rep. 735.
(30) U. S. v. Commerford, 25 Fed. Rep. 903.
(31) U. S. v. Brazeau, 78 Fed. Rep. 465.
(32) U. S. v. Slenker, 32 Fed. Rep. 695; U. S. v. McFadden, 165 Fed. Rep. 51 (N. J.) First indictment was dismissed on this ground; Com. v. Boynton, 12 Cush. 499.
(33) U. S. v. Clark, 37 Fed. Rep. 107, 108; Shepherd v. U. S., 160 Fed. Rep. 584.
(34) U. S. v. Moore, 129 Fed. Rep. 160.
(35) U. S. v. Martin, 50 Fed. Rep. 921.
(36) U. S. v. Lamkin, 73 Fed. Rep. 463. "The language 'go to bed with me' is itself neither obscene nor vulgar, and has never before been so held. * * * 'Taken in connection with the surrounding circumstances in this case, the conclusion is very natural that the defendant intended this as a proposition to violate chastity. * * * As there is nothing obscene or vulgar in the language itself, though it makes a proposition that ought in my opinion to be criminal, I do not feel at liberty to embrace it by construction." Concurring opinion in Dillard v. State, 41 Ga. 279; See also Edwards v. State (Tex.), 85 S. W. Rep. 797.
(37) U. S. v. Harmon, 45 Fed. Rep. 418.

much more intelligence than an average jury who by applying his "own method of analysis and reasoning," might conclude that a book was not "obscene" but, believing that a jury of lesser intelligence would conclude otherwise, he decided it would be his duty to find the defendant guilty. The test of obscenity is the "judgment of the jury of average intelligence" and jury's "*own opinion.*"[38]

Immoral Influence on Addressee Decisive.—The inquiry as to the tendency of the letter must be narrowed, it has been held, to the liability to corrupt the addressee.[39] Says one court: "Even an obscene book, or one that in view of the subject matter would ordinarily be classed as such, may be sent through the mails or be published to certain persons for certain purposes. For example, a treatise on venereal diseases might be sent through the mail or delivered to a student or practitioner of medicine, and perhaps to other persons for certain purposes.[40]

But other authorities have held broadly and without any regard for theory or principles that a communication, if obscene at all, is so without regard to the character of person to whom they are directed.[41]

Thus the following words in a letter, "Have sexual intercourse with me" is held obscene even though addressed to a prostitute.[42]

Immoral Influence on Particular Members of a General Class.—"It must be calculated with the *ordinary reader* to deprave him."[42a] It has been held that a writing is obscene where there is in it a "tendency to vitiate the *public taste* and to debauch the public morals."[43] So also it has been held that the "matter must be regarded as obscene if it should have a tendency to suggest impure and libidinous thoughts *in the minds of those open to* the influence of such thoughts. * * *" Whether the tendency of the matter charged as obscenity is to deprave and *corrupt those whose minds are open to such immoral influence,* and into whose hands a publication of this sort *may* fall."[44]

So also it has been said that the test is whether the writing is such as should go "into their (the jury's) families and be handed to their (the juror's) sons and daughters, and placed in boarding schools for the beneficial information of the young and others, then it was (the jury's) duty to acquit the defendant."[45]

"Unbecoming Literature."—The mere quality of being "unbecoming" is criterion of "obscenity."[46] On the other hand it is held that "unbecoming or even profane" language is not within the inhibition of the statute.[47]

Conflicts as to "Taste" and "Shock" as Tests.—The general notion is that protection to "morality" was the only thing sought by these statutes. But according to some the asthetic sense was also to be protected. However, here as everywhere else, there is conflict of authority.[48]

(38) Dunlap v. U. S., 165 U. S. 488. "A book to be obscene must appear so to the mind of the pure not to the impure merely." Com. v. Abbie Dyke Lee. (Unofficially reported in Heywood's Defense, p. 29.)

(39) U. S. v. Wroblensky, 118 Fed. Rep. 496; U. S. v. Moore, 129 Fed. Rep. 163; Edwards v. State, 85 S. W. Rep. 797.

(40) U. S. v. Clarke, 38 Fed. Rep. 502. "I cannot doubt that proper and necessary communication between physicians and patient touching any disease may be properly deposited in the mail. The statute is not to receive a strained construction." U. S. v. Smith, 45 Fed. Rep. 478.

(41) U. S. v. Cheeseman, 19 Fed. Rep. 498.

(42) Kelly v. State, 55 S. E. Rep. 482.

(42a) Ruling approved in Dunlap v. U. S., 165 U. S. 488.

(43) Montross v. State, 72 Ga. 266.

(44) U. S. v. Bennett, Fed. Case No. 14571, p. 1104; U. S. v. Debout, 28 Fed. Rep. 523; U. S. v. Slenker, 32 Fed. Rep. 693.

(45) Com. v. Landis, 8 Phila. R. 454; U. S. v. Heywood, Off. Sten. Rep. Morals not Art or Lit. 22; U. S. v. Silas Hicks, Off. Sten. Rep. Morals not Art, or U. S. v. Cheeseman, 19 Fed. Rep. 498.

(46) U. S. v. Williams, 3 Fed. Rep. 485.

(47) U. S. v. Smith, 11 Fed. Rep. 664.

(48) "Offensive to delicacy" is held sufficient in U. S. v. Britton, 17 Fed. Rep. 733. "Shocks the ordinary and common sense of men as an indecency." U. S. v. Davis, 38 Fed. Rep. 328. "Tendency to vitiate the public taste" is ma-

An obscene writing has also been defined as one offensive to decency, *indelicate,* impure, and an indecent one, as one *unbecoming,* immodest, unfit to be seen.[49] Also one that *shocks* the ordinary and common sense of men as an indecency is the test," AND YET!!—Look at this: "The court must * * * not allow a hypercritical judgment to take advantage of the elasticity of the language used by Congress, * * * by bringing within the act, words and thoughts that are only rude, impolite or *not in good taste,* according to the standard of decency prescribed by the purists in language and thought."[50]

Are Words Obscene Per Se?—Two federal courts have said: "There are in the language words known as words obscene in themselves."[51]

But a more careful state tribunal has said: "There is *not a single word* in the language, however coarse, low or vulgar, that may not be and is not often used to convey proper and decent ideas, and it is a mawkish and really an indelicate and immodest sensitiveness that blushes at a word which may be used obscenely, but which the occasion and the context show not to be so used."[52]

Must the Language be "Obscene."—The general rule as to the use of particular words is well stated as follows: "In as much as every letter is written, and is a composition of words, it necessarily follows that for a letter to be obnoxious to this statute *its language must be obscene, lewd or lascivious,* and it must be of an indecent character."[53] But observe that another court has held that the language or communication may be free from the condemnation of the statute in one instance while it would clearly fall within it when addressed to other persons.[54]

Wherein Must the Obscenity Be—Is Intent Material.—Here then it is held that the words sent through the mail must be obscene. Other cases say that the words need not be obscene. It is enough, though expressed in choicest words, if the idea is obscene. Again it is said that neither the words nor the idea actually expressed need be obscene, it being enough if these convey only to the most prurient imagination a mere *suggestion* of obscenity. And again it is decided that it cannot be that every suggestion of lascivious ideas is prohibited. Thus, it has been said: "It *cannot be that every writing or publication which in any way suggests a thought of the relation of the sexes is obscene, lewd and lascivious.* That would place upon the court a vast burden of separating the little matter that is mailable from the grand mass and majority of literature which would be non-mailable."[55]

terial element according to another court. Montross v. State, 72 Ga. 266. "If it is such as to offend the sense of delicacy." U. S. v. Sherman, (from official Stenog. notes, see Comstock's Morals not Art or Literature, p. 33.)

(49) U. S. v. Williams, 3 Fed. Rep. 485.

(50) U. S. v. Davis, 38 Fed. Rep. 327; U. S. v. Smith, 11 Fed. Rep. 664; U. S. v. Nightman, 29 Fed. Rep. 636.

(51) U. S. v. Bennett, Fed. Case No. 14571, p. 1102; U. S. v. Harmon, 38 Fed. Rep. 829.

(52) Dillard v. State, 41 Ga. 280.

(53) U. S. v. Lamkin, 73 Fed. Rep. 463; Dillard v. State, 41 Ga. 280.

(54) U. S. v. Wroblensky, 118 Fed. Rep. 496. But who are these authorized obscenists? "It is of no consequence that the language employed may be pure." U. S. v. Smith, 45 Fed. Rep. 478; U. S. v. Males, 51 Fed. Rep. 421; U. S. v. Hanover, 17 Fed. Rep. 444. "The poison of the asp may lie beneath the honeyed tongue just as a beautiful flower may contain a deadly odor. It is the effect of the language employed * * * which is struck at by the statute." U. S. v. Moore, 129 Fed. Rep. 161.

(55) U. S. v. Larkin & Adams (Wash., March 11, 1902) from official Stenog. Rep. "I have but little patience with those self-constituted guardians and censors of the public morals who are always on the alert to find something to be shocked at, who explore the wide domain of art, science and literature to find something immodest, and who attribute impurity where none is intended * * * The question of obscenity in any particular article must depend largely on the place, manner and object of its publication." U. S. v. Harmon, 38 Fed. Rep. 828-9. "The question of the violation of the statute rests upon the import and presumed motive." U. S. v. Wroblensky, 118 Fed. Rep. 496; Smith & Croker v. State, 24 Tex. Cr. App. 1.

Words get their point and meaning almost entirely from the time, place, circumstances *and intent* with which they are used. * * * *The intention of the defendant* who used the language and the purpose for which he used it * * * *constitutes the offense."* This is a rule announced by the best cases.[56]

Nevertheless, there are courts which hold that the *mistaken* view of the defendant as to the character and tendency of the writing, if it was in itself obscene and unfit for publication, would not excuse his violation of the law.[57] The criminal character of such a publication, in the view of these courts, is not affected or qualified by there being some *ulterior object* in view *of a different and honest character."*[58]

Medical Books—Uncertainty of the Law.—If, as many cases hold, truth and good motives are immaterial, and the character of the person to whom the matter is sent is also immaterial then a book which would be obscene if handed to an adolescent or pubescent child must also be so if mailed to a physician. However, sometimes the judicial dictum repudiates this logical consequence, and holds that standard medical works may be sent through the mails *to persons* who buy or call for them for the purpose of seeking information.[59] However, according to another authority they may *not* be offered to *all* with a view to stimulating the desire for information. Thus, it has been said that "Even scientific and medical publications containing illustrations exhibiting the human form, if wantonly exposed in the open markets, with a wanton and wicked desire to create a demand for them and not to promote the good of society by placing them in proper hands for useful purposes, would, if tending to excite lewd desires, be held to be obscene libels." * * * That it is "true and scientifically correct" is immaterial."[60]

Mr. Comstock tells of one Sherman who was three times arrested for circulating a book on hernia. The first two trials resulted in acquittal, because the jury did not consider it obscene. On the third trial the court instructed the jury that they must consider the verdict of other juries as immaterial, and then invented some new test of obscenity which resulted in conviction.[61]

Conclusion.—Unfortunately we have not had time to make an exhaustive study of the uncertainty in criteria of guilt in all these cases. However, we believe enough has been shown to demonstrate how arbitrary are all such proceedings because the statute utterly fails to supply any criteria of guilt and these are always of ex post facto creation, and made to fit the requirements of the moral sentimentalism of the judge or jury. Now we ask, are such uncertainties in the criteria of guilt the qualities of "law," and does such an arbitrary proceeding constitute "Due Process of Law?"

THEODORE SCHROEDER.

New York, N. Y.

(56) Dillard v. State, 41 Ga. 280, 281. (The second sentence is from the concurring opinion of another judge.) "We think it would also be a proper test of obscenity in a painting or statue whether the motive of the painting or statue so to speak, as indicated by it is pure or impure." People v. Muller, 96 N. Y. 411.

(57) Com. v. Landis, 8 Phila. 455. "The statute does not declare that the letter must be written for an indecent or obscene purpose." U. S. v. Lamkin, 73 Fed. Rep. 463.

(58) Regina v. Hicklin, L. R. 3 Q. B. 360; Steele v. Brannan, L. R. 7 C. P. 261. "I have stated the object with which the book is written is not material, nor is the motive which leads the defendant to mail the book material. * * * His motive may have been ever so pure; if the book he mailed was obscene, he is guilty." U. S. v. Bennett, Fed. Case No. 14571, p. 1102; U. S. v. Clarke, 38 Fed. Rep. 502; U. S. v. Debout, 28 Fed. Rep. 524. "Where the writings * * * are of an obscene, lewd, or lascivious character, the fact that they were sent in the real or supposed interest of science, philosophy or morality, is immaterial." (Syllabus.) Charge quoted in U. S. v. Slenker, 32 Fed. Rep. 691.

(59) U. S. v. Clarke, 38 Fed. Rep. 733; U. S. v. Smith, 45 Fed. Rep. 478.

(60) Com. v. Landis, 8 Phila. 454; U. S. v. Burton, 142 Fed. Rep. 58; U. S. v. Chesman, 19 Fed. Rep 498. "The object no doubt is to display the nature of a particular disease and the effect of a particular medicine, but it is not commendable even to medical men, to display such representations in public." Reg. v. Grey, 4 Foster and Finlanson, 75.

(61) U. S. v. Sherman, Morals not Literature or Art, p. 33.

DESCENT AND DISTRIBUTION—ADVANCEMENTS.

TAYLOR v. EVERETT..
52. So. 980.

Supreme Court of Florida, Division A. June 21, 1910.

Where an advancement has been made by a parent to his child, the value of the advancement at the time it was made should be brought into hotchpot, and no interest should be charged on the advancement before it is called into hotchpot.

WHITFIELD, C. J.: On a former appeal in this cause it was ordered that certain property given by the intestate during his life to a daughter be brought into hotchpot. Sewell v. Everett, 57 Fla. 529, 49 So. 187. In the subsequent proceedings the trial court decreed that upon bringing $120 into hotchpot, as the value of the advancement when made, the heirs of the daughter to whom the advancement was made, be allowed to partici pate in the estate, On appeal from this decree it is contended that interest from the death of the intestate should have been added to the $120 brought into hotchpot.

Section 2302 of the General Statutes of 1906 provides that: "When any of the children of the person dying intestate shall have received from such intestate, in his lifetime, any real or personal estate by way of advancement, and shall choose to come into the partition of the estate with the other parceners, such advancement, both of real and personal estate, shall be brought into hotchpot with the whole estate, real and personal, descended; and such party bringing into hotchpot such advancement as aforesaid, shall thereon be entitled to his or their proper portion of the whole estate so descended, both real and personal; and the value of the estate so advanced as aforesaid shall be estimated at the time of advancement and not at the death of the testator."

This statute expressly provides that "the value of the estate so advanced * * * shall be estimated at the time of advancement," and the statute does not contemplate the payment of interest on advancements made and brought into hotchpot.

The court in its decree found all the land of the intestate "acre for acre to be the same on an average, and that the value of all of said lands at the date of the" advancement "was the same, and that all of said lands * * * was worth the sum of $150 per acre." The advancement here involved was 80 acres of the land. In decreeing that $120, the value of the advancement when made, be brought into hotchpot, the statute was observed.

An advancement being a gift, and not a debt, interest is not charged on the value of the advancement, at least until after the advancement is required to be brought into hotchpot, unless a contrary intent of the intestate appears, since the intestate and the law intend the benefits to accrue from the advancement, and the person receiving the advancement may elect to keep the advancement, and thereby relinquish a right to participate in the distribution of the intestate's estate. See Towles v. Roundtree, 10 Fla. 299; Davis v. Hughes, 86 Va. 909, 11 S. E. 488; Harris v. Allen, 18 Ga. 177; Hanner v. Winburn, 42 N. C. 142.

Any advantage that may accrue to a child from an advancement may be regarded as intended by the parent, and the statute requires an accounting for only the value of the advancement at the time it was made.

The decree is affirmed.

NOTE.—*Interest on Advancements Where They are Brought into Hotchpot.*—In McCoy v. McCoy, 105 Va. 829, 54 S. E. 995, it is said: "Upon the principle that equality is equity, advancements made in the lifetime of a parent must be brought into hotchpot by those who receive them, in order that there may be perfect equality among those who share in the estate of the parent." But this principle of perfect equality seems to have an exception in the rule announced in the principal case, and its modification in other cases, there being substantial agreement that no interest accrues during the life of the parent. Considering that a child, who has received an advancement, has an absolute option to bring or not his advancement into hotchpot, this exception appears to militate very directly against the basic principle of hotchpot. The opinion in McCoy v. McCoy, *supra*, says: "While a child receiving an advancement from a parent may bring such advancement into hotchpot and share in the division or distribution of the estate of the parent after his death, he cannot be required to pay back to the estate any part of the advancement, and, if it turns out that he has received, by way of an advancement, an equal share with the others of the estate, or more than his share, he can only be excluded from participation in the division or distribution of the estate." The child who has been advanced is seen, therefore, to occupy vantage ground over the others in choice, and no exercise thereof may bring about the absolute equality spoken of. This rule may be based on the maxim of *nemo est haeres virentis*, user of the advancement being so to speak permissive and election being constructively a return of the property, for hotchpot, to the body of what is being inherited.

But this theory is not strictly enforced, otherwise, it would seem, that, if the child who has received an advancement elects to bring it into

hotchpot he ought to pay interest from the date of the death of the parent, and not from the time it is called into hotchpot as the principal case decides.

In Sprague v. Moore, 130 Mich. 92, 89 N. W. 712, it is said to be the general rule that interest is to be computed upon advancements from the death of the ancestor, but intention as to a particular advancement may increase the estate by interest accruing prior to this time. In that case it was said that the ancestor sought to divide her estate from a certain date.

Intention may also postpone the commencement of interest, where otherwise it would begin at the death of the ancestor. Thus in Cole v. Andrews, 176 N. Y. 374, 68 N. E. 641, it was said: "The instrument (by the son) is an acknowledgment that the father has furnished a specified sum of money to the son; that it is not a gift, but a debt due the father, and that it may be collected after the decease of the father by his legal representatives, (1) by treating the sum furnished as a loan and enforcing it, or (2) by treating it as advancement and deducting it from the son's share in the estate." It was held that interest should be computed from the day the executors elected which course they would pursue.

In Wysong v. Rambo (Tenn.), 56 S. W. 1053, 49 L. R. A. 766, the general rule is stated to be as in Sprague v. Moore, *supra*, but the enforcement of equality may mitigate its application as based on conduct of heirs, so far at least as the advancement has been of land. Thus where some of the heirs had advancements of land it was ruled that interest need not run from the death of the ancestor to distribution, where another heir whose share was to be equalized failed to take any steps to procure a settlement of the estate for many years and in the meantime permitted the first mentioned heirs to enjoy the possession of their lands. This case refers to prior Tennessee decision showing the established rule of interest from the time of the death of the ancestor saying: "From the foregoing review we apprehend that interest should be charged upon advancements, as a matter of law, from the death of the ancestor, as a means of producing equality, unless there is some equitable consideration in the case which will justify an exception." The facts of the case were thought to create an exception. As seemingly in accord with the principal case are Boyd v. White, 32 Ga. 530; Hanner v. Winburn, 42 N. C. (7 Fed.) 142; In re Thompson's Estate, 13 Phila. 202, while the following appear to make interest begin to run from the death of the ancestor: Carroll v. Succession of Carroll, 48 La. Ann. 956, 20 So. 210; Rickenbacker v. Zimmerman, 10 S. C. (10 Rich.) 110, 30 Am. Rep. 37; Kyle v. Conrad, 25 W. Va. 760.

The theory of postponing interest after the ancestor's death has been stated to be that the administrator is not immediately charged with interest, a principle which might work well as to personal property, but not as to land which vests in the heirs on the death of the ancestor.

However, it seems to be the case that the rule of when interest shall commence is not inflexible, except that it cannot begin before the ancestor's death, unless intent that it shall, is discoverable in the case of a particular advancement.

C.

JETSAM AND FLOTSAM.

THE AMERICAN CORPUS JURIS—DEAN WIGMORE'S OBJECTION.

The idealistic scheme sprung in the February Green Bag by Mr. L. H. Alexander of Philadelphia, Dr. James De Witt Andrews and Dean Geo. W. Kirchwey of the Columbia Law School and which was announced with such a great flourish of trumpets is receiving very little encouragement from the profession.

The Central Law Journal (70 C. L. J. 127) was the first to call attention to certain considerations which made the enterprise entirely impracticable and a financial imposition on the profession. We received letters from all over the country commending our position.

Now comes Dean John H. Wigmore of the Northwestern University, who publicly interposes a vigorous dissent. In a letter to the Green Bag (22 Green Bag 428) Prof. Wigmore says:

To the Editor of the Green Bag:

Sir: I have read in your February number the Memorandum proposing an "American Corpus Juris,"—having already perused the Memorandum in manuscript, by the courtesy of my very good friends, Messrs. Alexander, Kirchwey, and Andrews, its proposers. I regret to take any public position of dissent from their plans. But I am unwilling to see the proposal given such publicity without doing my small share to save the supposed benefactor from wasting (as I conceive) his money on it.

The proposal is untimely, unsound and futile.

It is untimely, because our law is passing through a period of radical changes, both in substance and in form, all along the line. A generation must elapse before it can be stated accurately as a body of fixed and coherent principles.

It is unsound, because there are to-day fifty distinct bodies of independent sovereign law within this nation, varying at countless points and in infinite details. Therefore, it is and will be scientifically false to attempt to state an "American" law, until the progress of Uniform Codification (just begun by the National Conference) shall have removed the larger part of this tangled mass of irreconcilable contrarieties. That period is yet far off. Its arrival will depend mainly upon the speed of assimilation in social conditions, and cannot be conjured into fancied existence by twenty volumes of printer's ink.

It is futile, because there are not yet in this country scholars enough to produce such a work equal to the ideals set forth. And there are not scholars enough, because we have yet, as a profession, been devoting too brief a period of years to the scientific study and analysis of law, and therefore do not yet possess an output numerous enough to insure the easy discovery and availability of men qualified for that particular task. There is reason to believe that the compilation of this particular "Corpus Juris" would necessarily involve embodying and fixing permanently upon our law an un-

tested and premature juristic analysis and method. This would be, juristically, a calamity for our law. The opinion that it would be a calamity is shared by several well-known legal thinkers with whom I have discussed the matter before now. In making public this firm conviction, I am moved (as those who know me will well understand) only by a sense of respect for the scientific needs of our law, and not by any desire to show disrespect for the learned authors of the project.

I do not wish to enter upon any controversy, but merely record my emphatic dissent, and to encourage those who share this dissent.

JOHN H. WIGMORE.

Chicago, Ill., May 10, 1910.

The views of Prof. Wigmore, are, he says, shared by "several well-known legal thinkers," and in our own investigation we have recently received private assurances from the dean of the law department of one of the largest eastern universities that the scheme, while ideally perfect, is practically chimerical.

As a matter of fact, "America" has no law, that can be stated. The United States could not give a uniform answer to hardly a single important legal question, unless we permit the federal supreme court to declare for us what might be said to be the only pure uniform and thoroughly established system of American law.

Not until the United States comes to that point where the people are willing to lodge final judicial power on all questions in one supreme tribunal, will there ever be any such thing as American law.

To-day, the law in two adjoining states such as Connecticut and New York, or Louisiana and Mississippi, are as far apart in many instances as the laws of the continental nations of Europe are from that of England.

Until there is some competent authority which is able, by its mere fiat, to co-ordinate all the law of a country into one system, that country can have no uniform system of law and therefore no "corpus juris."

Whether the uniform codification of certain branches of the law will ultimately bring about practical uniformity, we are not quite so hopeful, even as Prof. Wigmore is, but we are willing to give that scheme our heartiest approval as the most practicable suggestion in this direction.

Our worthy contemporary, the Green Bag, and Messrs. Alexander, Kirchwey and Andrews should not take themselves too seriously in advancing the suggestion of this stupendous undertaking and therefore should not be impatient of criticism of their scheme, especially since they have attempted to launch it, not as a private enterprise, but as representing the will and desire of the legal profession.

If we had any idea that this scheme would have any value to help the overburdened and sometimes bewildered practitioner to arrive any more quickly to a solution of the questions that come before him from day to day, we should be glad to lend our aid and assistance to the proposed plan and toward finding the proposed benefactor who is expected to put up one million dollars to finance it. But, when we are asking for charity, we ought to be certain that the thing we are asking for is the thing we need.

A. H. ROBBINS.

CORRESPONDENCE.

STIPULATION FOR ATTORNEYS' FEES IN COMMERCIAL PAPER.

Editor Central Law Journal:

I have been interested in the Texas Court of Civil Appeals case of Reed v. Taylor, found in your issue of this date (No. 7 of Vol. 71), and in your comment thereon. The law as there stated by the Texas court and as you comment upon the subject, with reference to a stipulation for attorney's fees in promissory notes in case the notes are placed in the hands of an attorney for suit and suit is brought, is not the law in Wisconsin. And it seems to the writer that the better reason is with the Supreme Court of Wisconsin.

The Wisconsin court has held that a stipulation in a mortgage to pay attorney's or solicitor's fees, other than taxable costs, in case it became necessary to foreclose the same, is not void, and will be enforced when the amount stipulated to be paid is reasonable. Boyd v. Sumner, 10 Wis. 41; Rice v. Cribb, 12 Wis. 179; Hitchcock v. Merrick, 15 Wis. 522; Reed v. Catlin, 49 Wis. 686; Bank v. Larsen, 60 Wis. 206.

In the case of Bank v. Larsen, supra, the court holds that a stipulation for the payment of ten per cent attorney's fees for collection in case the principal and interest were not paid at or before maturity and suit is brought thereon is valid, justifying that ruling upon the repeated decisions of the court in the case of mortgages. The court holds, however, that as the amount to be recovered is uncertain, as this item is to be determined by the court in the light of the evidence submitted and the surrounding circumstances, that the instrument itself is non-negotiable. It must be a reasonable compensation. See also Woods v. North, 84 Pa. St. 407.

The Wisconsin court makes this interesting observation in the case of Bank v. Larsen, supra, as to the nature of such instruments: "We think the rule laid down by the courts which hold the notes not negotiable when the amount recoverable by action is not certain and fixed, is the better rule, and that the public interests require that negotiable promissory notes should not be connected with other collateral agreements which render the amount recoverable thereon uncertain."

Altogether, it would seem that the reason for the rule as laid down by the Supreme Court of Wisconsin was fully warranted and justified by the great and growing needs of commercial life.

Very truly yours,

DUANE MOWRY.

Milwaukee, Wis.

HUMOR OF THE LAW.

The manager of the sideshow was before the bar for kidnapping.

"Yes, judge," he confessed solemnly, "in a moment of weakness I sneaked into the museum and carried the fat lady away in my arms."

"In a moment of weakness!" gasped the judge, who remembered that the fat lady tipped the scales at 550 pounds. "Great Scott, man! What would you have done in a moment of strongness?"—Chicago News.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Adverse Possession**—Burden of Proof.—One who claims a marketable title by virtue of adverse possession without a complete record title has the burden of establishing his right.—Blixt v. Eltoma Realty Co., 122 N. Y. Supp. 861.

2. **Assumpsit, Action on**—When Lies—Under a special contract, where performance has been fully completed and the only duty remaining is to pay the money, it is not essential to a recovery that the suit be based on the special agreement, but assumpsit will lie.—Scholz v. Schneck's Estate, Ind., 91 N. E. 730.

3. **Attachment**—Corporate Stock.—A holder for value of corporate stock by a previous unregistered transfer, in good faith, prevails against an attaching creditor or execution purchaser.—National Bank of the Pacific v. Western Pac. Ry. Co., Cal., 108 Pac. 676.

4. **Bankruptcy**—Action by Trustee.—An action by a trustee in bankruptcy to recover damages from defendants, upon allegations that they conspired with the bankrupt, knowing him to be insolvent, and pursuant to such conspiracy he purchased goods on credit, which he turned over to defendants for less than their value, is one merely to recover damages for the conspiracy, and not to set aside a fraudulent transfer of property.—Lynch v. Bronton, U. S. D. C., D. Conn., 177 Fed. 605.

5.——Claims Against Estate.—A landlord's lien on personal property liable to distress will be preserved as against its proceeds in priority to the general expense of administration of the lessee's estate in bankruptcy, subject only to the direct expense of realizing the fund.—In re Bayley, U. S. D. C., N. D. Pa., 177 Fed. 522.

6.——Contingent Interest in Property.—Where a bankrupt could transfer a possible future interest in personal property before his bankruptcy, it passes to the assignee in bankruptcy. Martin & Earle v. Maxwell, S. C., 67 S. E. 962.

7.——Contingent Remainders.—Under Bankr. Act a contingent remainder in land held to be subject to sale by the trustee.—Martin & Earle v. Maxwell, S. C., 67 S. E. 962.

8.——Discharge.—The defense of a discharge in bankruptcy is not regarded with any greater disfavor than any other legitimate and meritorious defense.—Citizens' Nat. Bank of Sisseton, S. D., v. Branden, N. D., 126 N. W. 102.

9.——Fees of Attorney for Creditors.—Under Bankr. Act. an attorney for creditors in bankruptcy opposing claims for the appointment of a trustee is not entitled to compensation for his services, except in cases where the trustee has improperly refused to make defense.—In re Roadarmour, U. S. C. C. of App., Sixth Circuit, 177 Fed. 379.

10.——Proceedings in Rem.—Suit to foreclose a mortgage executed more than four months before bankruptcy proceedings, instituted in the state court within such four-month period, could not be stayed by the bankruptcy court, under Bankr. Act July 1, 1898. c. 541, sec. 11a, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426).—In re Robrer, U. S. C. C. of App., Sixth Circuit, 177 Fed. 381.

11.——Rights of Creditors.—A creditor of a bankrupt is entitled to enjoin the debtor from receiving exempt property in the hands of the trustee in bankruptcy, a portion of which was not exempt as to the creditor, and to appointment of receiver of the property to be administered in state courts.—Arnwine v. Beaver, Ga., 67 S. E. 937.

12.——Rights of Insolvent.—An insolvent held entitled to settle a contest of his father's will as against his creditors, giving a subsequent trustee in bankruptcy no right of action except to recover any sum the bankrupt may have received and afterwards transferred in derogation of the bankruptcy law.—Edington v. Masson, U. S. C. C. of App., Fifth Circuit, 177 Fed. 209.

13.——Temporary Receivers.—A temporary receiver of an alleged bankrupt is only authorized to make an inventory and to receive and retain in his possession all of the bankrupt's assets.—In re Leonard, U. S. D. C., D. Nev., 177 Fed. 503.

14.——Title of Trustee.—Bankruptcy Act discloses an intent to vest title in the trustee on his appointment to all the bankrupt's nonexempt property, but only for the purpose of distribution to the creditors.—Bracklee Co. v. O'Connor, 122 N. Y. Supp. 710.

15. **Carriers**—Injury to Fruit in Transit.—A shipper whose peaches were injured in transit was liable for at least the freight charges on so much of the car load as he received, though not liable for charges on the damaged part of the peaches.—Dean v. Toledo, St. L. & W. R. Co., Mo., 128 S. W. 10.

16.——Regulation of Rates.—The interstate commerce act allows differential and discriminative rates so long as they are not unjust or do not operate unfairly, and the essence of the act is that whatever the rates it shall be the same to all persons similarly situated.—Pittsburg, C., C. & St. L. Ry. Co. v. Mitchell, Ind., 91 N. E. 735.

17. **Carriers of Passengers**—Negligent Starting of Car.—The starting of a street car on a starting signal, given without authority by a

passenger, and supposed by the motorman to have been given by the conductor, held not negligence.—Cary v. Los Angeles Ry. Co., Cal., 108 Pac. 682.

18.——Payment of Passenger's Fare by Third Person.—Where another than the passenger offers to pay the fare, the conductor is bound to accept, but such payment must be acquiesced in by the passenger, either by express or silent assent.—Kirk v. Seattle Electric Co., Wash., 108 Pac. 604.

19. **Chattel Mortgages**—Fraud.—Execution of notes and chattel mortgage for the price of machinery which defendant had been induced to purchase by fraud held part of the same transaction and therefore voidable.—J. I. Case Threshing Mach. Co. v. Feezor, N. C., 67 S. E. 1004.

20. **Constitutional Law**—Anti-Trust Laws.—The validity of the penalties prescribed by the Mississippi anti-trust laws cannot be challenged in a suit in which the state sued to dissolve an association which those laws condemn.—Grenada Lumber Co. v. State of Mississippi, U. S. S. C., 30 Sup. Ct. 535.

21. **Contracts**—Building Contracts.—A building contractor is entitled to do his work and earn his payments in the order prescribed by the contract, except as the necessities of building require him to do in some part of the work for which compensation is provided in the later installments.—Jones v. Dodge, 122 N. Y. Supp. 815.

22.——Consideration.—Where a contract is made between two parties for the benefit of a third, the latter need not pay any consideration.—Klitzke v. Smith, Ind., 91 N. E. 748.

23.——What Law Governs.—Courts of this state held not bound by comity to sustain a contract opposed to the public policy of the state, because valid where made.—Carstens Packing Co. v. Southern Pac. Co., Wash., 108 Pac. 613.

24. **Corporations**—Authority of Officers.—The seal of a corporation on a deed purporting to have been made by the corporation through its president is affirmative evidence of the president's authority to make the deed.—Taylor v. Hartsfield, Ga., 68 S. E. 70.

25.——Equal Protection of Law.—Corporations held not denied equal protection of the laws because corporate violators of the Tennessee anti-trust act may be proceeded against by bill in equity, while natural persons cannot be tried without indictment by grand jury and a trial by jury.—Standard Oil Co. of Kentucky v. State of Tennessee, U. S. S. C., 30 Sup. Ct. 543.

26.——Stockholders.—Complaint of a minority stockholder, alleging that certain stockholders of a corporation participated in a fraudulent division of the profits, from which he was excluded, is demurrable, if plaintiff's effort is to share in the fruits of a fraud perpetrated on the corporation.—Proctor v. Piedmont Portland Cement & Lime Co., Ga., 67 S. E. 942.

27. **Costs**—Policy of Law.—The policy of the law in imposing costs is not only to reimburse the successful party, but to discourage litigation.—People v. Woodbury, 122 N. Y. Supp. 904.

28. **Courts**—Jurisdiction.—Though jurisdiction of the person might be conferred upon a court by consent, that of the subject-matter cannot.—Catlin v. Jones, Or., 108 Pac. 633.

29.——Jurisdiction.—Where a nonresident defendant has no property within a state, and does not subject himself to its jurisdiction, the power to judicially proceed against him is wholly absent.—Guffey v. Grand Trunk Ry. Co. of Canada, 122 N. Y. Supp. 947.

30. **Criminal Evidence**—Instructions.—An instruction that the jury must consider the interest of accused in weighing his testimony held an invasion of the province of the jury.—Tucker v. State, Ala., 52 So. 464.

31. **Criminal Law**—Cruel and Unusual Punishment.—Cruel and unusual punishment forbidden by Philippine Bill of Rights is inflicted by Philippine Penal Code under which the falsification by a public official of an official document must be punished by fine and imprisonment for hard labor for a period ranging from 12 years and a day to 20 years, carrying a chain at the ankle, hanging from the wrist, as deprivation of civil rights and perpetual disqualification to enjoy political rights.—Weems v. United States, U. S. S. C., 30 Sup. Ct. 544.

32.——Immunity from Prosecution.—A shield against successful prosecution, not immunity from the prosecution, was secured by Act Cong. Feb. 25, 1903.—Heike v. United States, U. S. S. C., 30 Sup. Ct. 539.

33.—Inconsistent Defenses.—Inconsistent defenses to being an accessory before the fact held not permissible.—State v. Kinchen, La., 52 So. 185.

34.——Jeopardy.—Defendants, in a murder prosecution, held not to have been in jeopardy in a previous trial resulting in a mistrial so as to require their discharge.—State v. Dry, N. C., 67 S. E. 1000,

35. **Customs and Usages**—Varying Contract.—Parol evidence of usage or custom either general or in a particular trade or business is not admissible to vary or modify the terms of a written contract of sale.—R. J. Menz Lumber Co. v. E. J. McNeeley & Co., Wash., 108 Pac. 621.

36. **Damages**—Contingent and Possible Consequences.—In a personal injury action, evidence that future consequences would be likely to occur from the injuries sustained held inadmissible.—Osterhout v. Delaware L. & W. R. Co., 122 N. Y. Supp. 692.

37.——Exemplary.—Exemplary damages are not recoverable for breach of contract to furnish telephone service.—Southwestern Telegraph & Telephone Co. v. Luckett, Tex., 127 S. W. 856.

38.——Pleading.—An allegation that two of plaintiff's ribs were broken and that she was bruised and wounded held sufficient to authorize evidence of pain and suffering.—Klein v. Burleson, 122 N. Y. Supp. 752.

39. **Dead Bodies**—Duty of Administrator.—It is no part of an administrator's duty to bury deceased.—In re Gray's Estate, Ind., 91 N. E. 745.

40. **Death**—Damages.—If the measure of recovery in a death action be based upon the present value of what decedent would probably have contributed to his family had he lived, the discount should be made only from the time when such contributions would have been actually made.—Evans v. Oregon Short Line R. Co., Utah, 108 Pac. 638.

41. **Depositions**—Right to Take.—Motion to suppress deposition, taken under Code Civ. Proc. sec. 871, of person who had sustained personal injuries, to be used in a subsequent action by the wife in the event of the death of her hus-

band from such injuries, denied.—Vibbard v. Kinser Const. Co., 122 N. Y. Supp. 1068.

42. **Divorce**—Fraud as Grounds.—That a wife, before marriage, falsely represented to her husband that she was pregnant, thereby inducing the marriage, is not ground for divorce.—Young v. Young, Tex., 127 S. W. 898.

43. **Dower**—Effect of Invalid Marriage—A woman marrying a second husband after the absence of her first husband for more than five years without being heard from held entitled on the death of her second husband to an interest in his estate, notwithstanding subsequent reappearance of first husband.—In re McKinley's Estate, 122 N. Y. Supp. 807.

44. **Easements**—Acquisition.—A sale and purchase of lots abutting on streets as projected on a map held to create private easements over the projected streets as between the vendor and the purchaser purchasing with knowledge of the map and in reliance on it.—In re Edgewater Road in City of New York, 122 N. Y. Supp. 931.

45. **Eminent Domain**—Compensation.—Where an abutter does not own the fee in the street, damages from constructing a street railroad may be restricted to injury to light air and access; but if he owns the fee, he may recover damages entailed by proper operation of the road.—Rasch v. Nassau Electric R. Co., N. Y., 91 N. E. 785.

46.——Taking Private Property for Public Use.—The closing by a city of a street crossing railroad tracks did not constitute a taking of private property for public use.—Crowell v. City of Monroe, N. C., 67 S. E. 989.

47. **Equity**—Cross-Bill.—Where a cross-bill in equity alleges new matter and asks affirmative relief, dismissal of the original bill does not of itself dismiss the cross-bill.—Spencer v. Spencer, Fla., 52 So. 146.

48.——Laches.—When delay is of such a nature as to prevent substantial justice between the parties, the courts will declare that the remedy sought is inequitable.—Ater v. Smith, Ill., 91 N. E. 776.

49. **Estoppel**—Nature and Grounds.—Estoppels are raised to prevent fraud.—Klitzke v. Smith, Ind., 91 N. E. 748.

50. **Evidence**—Statutes of Another State.—The statute of another state must be proved like any other fact.—In re Campbell's Estate, Cal., 108 Pac. 669.

51. **Executors and Administrators**—Assets.—The good will of the decedent's interest in a business is an asset of the estate in the hands of the executor, so as to be chargeable to him on his accounting.—In re Vivanti's Estate, 122 N. Y. Supp. 954.

52.——Estoppel.—Heirs accepting the benefits of a succession sale and becoming tenants of the purchaser held estopped to deny the validity of the sale.—Estrade v. Kaack, La., 52 So. 181.

53. **Fidelity Insurance**—Extent of Liability.—The liability of a surety company on a fidelity bond to all creditors of the person guaranteed is limited to the penalty of the bond.—Illinois Surety Co. v. Mattone, 122 N. Y. Supp. 928.

54. **Fraud**—Necessity of Disaffirmance of Contract.—In an action for damages for fraudulently inducing plaintiff to purchase stock in a corporation, the rule necessitating the disaffirmance of the contract sought to be rescinded has no application.—Potts v. Lambie, 122 N. Y. Supp. 935.

55. **Frauds, Statute of**—Contracts Affecting Realty.—The statute of frauds applies to contracts concerning land when they are executory.—Bailey v. Bishop, N. C., 67 S. E. 968.

56.——Contract to Surrender Lease. — Parol evidence of an agreement by a tenant to allow an order in summary proceedings to be entered against him by default, in consideration of being released from arrears of rent, held admissible in an action to recover the rent.—Mouquin v. Hergenhan, 122 N. Y. Supp. 858.

57.——Debt of Another.—To make a promise to pay for goods original, the credit must have been given exclusively to the promisor, though the person for whose benefit the promise was made need not be released from liability unless the promise was to pay a pre-existing debt.—McGowan Commercial Co. v. Midland Coal & Lumber Co., Mont., 108 Pac. 655.

58. **Guardian and Ward**—Authority of Court.—A guardian of an infant could not without an order of court bind the infant's estate by an agreement with an attorney employed by the guardian to sue for money belonging to the estate as to the value of the attorney's services and disbursements for which he was entitled to be imbursed.—Weber v. Werner, 122 N. Y. Supp. 943.

59. **Husband and Wife**—Mortgage by Wife.—If one purchasing at a mortgage foreclosure sale for the owner's benefit was bound to reconvey, a second mortgage which the purchaser compelled the owner to execute to secure her husband's debts in order to procure a reconveyance was invalid.—Myers v. Grey 122 N. Y. Supp. 1079.

60.——Tenants by Entireties.—Where husband and wife owned land as tenants by the entireties, an action originally brought by the husband alone for an injury to the land was sufficient to invoke the court's jurisdiction over the subject-matter.—Niagara Oil Co. v. Jackson, Ind., 91 N. E. 825.

61. **Injunction**—Scope of Relief.—An injunction should never go beyond the requirements of the particular case.—Collins v. Wayne Iron Works, Pa., 76 Atl. 24.

62.—Threatened Trespass.—A threatened disturbance to an owner's right of possession authorizes an injunction.—Brenner v. Heiler, Ind., 91 N. E. 744.

63. **Innkeepers**—Injury to Guest.—Proof that a guest at a hotel was injured by being struck by a falling piece of plaster held to cast the burden upon the landlord of showing that the accident was not due to his negligence.—Morris v. Zimmerman, 122 N. Y. Supp. 900.

64. **Insane Persons**—Power of State.—One acquitted of crime because insane and committed under Code Cr. Proc., sec. 454, to the Matteawan State Hospital, because his insanity would make him, if set free, a danger to public peace, is more than a mere insane ward of the state, and the state is the possessor of him under the police power.—In re Thaw, 122 N. Y. Supp. 970.

65. **Judgment**—Nonsuit.—A judgment of nonsuit is a mere dismissal of the cause, and not a judgment that can be pleaded in bar of any subsequent action.—Dean v. Toledo, St. L. & W. R. Co., Mo., 128 S. W. 10.

66. **Landlord and Tenant**—Surrender of Option to Purchase.—The voluntary extinguish-

ment of the rights of a tenant under a lease which contained an option for the purchase of the property is a good consideration for the release by the landlord of his right to unpaid rent.—Mouquin v. Hergenhan, 122 N. Y. Supp. 858.

67.——Termination of Lease.—A lease held not to be terminated ipso facto by breach of a covenant against assignment, but to give the landlord the right to declare it at an end at her option.—Janes v. Paddell, 122 N. Y. Supp. 760.

68.——Wrongful Eviction.—On wrongful invasion of the rights of tenant by landlord, the tenant may sue on covenants for quiet enjoyment.—Schienle v Eckels, Pa., 76 Atl. 15.

69. **Libel and Slander**—Submission of Case to Jury.—One suing for libel held entitled to have his case submitted to the jury, where the article complained of is susceptible of the libelous meaning ascribed to it in the innuendo.—Hoey v. New York Times Co., 122 N. Y. Supp. 978.

70. **Malicious Prosecution**—Probable Cause.—Acquittal of accused held only admissible in an action for malicious prosecution to show that the prosecution had terminated, and was irrelevant on the issue of probable cause.—Downing v. Stone, N. C., 68 S. E. 9.

71. **Mandamus**—Water Companies.—Resident of city may maintain mandamus against water company to compel it to furnish him with water.—McClaugherty v. Bluefield Waterworks & Improvement Co., W. Va., 68 S. E. 28.

72.——Water Supply.—A citizen whose water supply was cut off by a city held entitled to mandamus, under Civ. Code 1895, sec. 4867.—City of Camilla v. Norris, Ga., 67 S. E. 940.

73. **Marriage**—Annulment.—A marriage is properly annulled, where consent of complainant was procured by violence or threats.—Quealy v. Waldron, La., 52 So. 479.

74.——Fraud.—False representation of a woman before marrying that she had been the wife of another, when she had been his mistress, held to sustain an action to annul the marriage for fraud.—Domschke v. Domschke, 122 N. Y. Supp. 892.

75.——Presumptions.—Presumption of marriage from cohabitation and repute held removed by the legal marriage of one of the parties with a third person during the lifetime of the other.—In re Campbell's Estate, Cal., 108 Pac. 669.

76. **Master and Servant** — Care Required.—Where railroad employees had customarily ridden on the engine between certain stations in the discharge of their duties long enough to charge the company with notice of such custom, it was bound to use reasonable care to transport them safely.—Heilig v. Southern Ry. Co., N. C., 67 S. E. 1009.

77.——Injury to Servant.—A youthful employee held entitled to recover for injuries sustained by thrusting his hand into a machine after slipping on the platform thereof, because of oil which had dripped from the machine.—Martin v. Walker & Williams Mfg. Co., N. Y., 91 N. E. 798.

78.——Inducing Servant to Leave Employment.—Defendant insurance company held liable for resulting damages from wrongfully and maliciously inducing plaintiff insurance company's agent to leave its employment and enter their own employment for the purpose of injuring plaintiff's business.—Globe & Rutgers Fire Ins. Co. v. Firemen's Fund Fire Ins. Co., Miss., 52 So. 454.

79.——Injuries to Servant.—Defendant railroad held not liable for injuries to a servant, whose hand, while cleaning a car and raising a car window, went through the glass; the appliance being a simple one and the injury one not ordinarily likely to happen.—House v. Southern Ry. Co., N. C., 67 S. E. 981.

80.——Injuries to Servant.—Regulations of a railroad's relief department releasing the railroad company from liability for negligent injuries as a condition to the employees' right to relief, made in such department, held invalid.—Barden v. Atlantic Coast Line Ry. Co., N. C., 67 S. E. 971.

81.——Safe Place to Work.—A master held not liable for injuries to a servant from a cause too remote to be reasonably apprehended.—Devine v. Alphons Custodis Chimney Const. Co., N. Y., 91 N. E. 791.

82.——Safe Place to Work.—The dangerous condition of a tie on which a bridge worker stepped held brought about in the course of the work, so that the rule as to furnishing a safe place to work did not apply.—Brady v. Pennsylvania Steel Co., 122 N. Y. Supp. 907.

83. **Mechanics' Liens**—Property of Wife.—A mechanic's lien may be acquired against the property of a married woman without a formal contract on her part.—Payne v. Flack, N. C., 68 S. E. 16.

84. **Money Paid**—Grounds of Recovery.—A plaintiff may recover against a defendant, as for money paid to his use, to the extent of a claim paid by plaintiff which should have been paid by defendant.—Bailey v. Bishop, N. C., 67 S. E. 968.

85. **Municipal Corporations**—Aiding Railroad.—A special tax, voted to a railroad company on specified conditions, held properly annulled, at the suit of a taxpayer, for failure of the company to comply with the conditions.—W. K. Henderson Iron Works and Supply Co. v. City of Shreveport, La., 52 So. 477.

86.—Bond of Contractor.—Bond given by contractor to city held available for protection of a materialman furnishing materials to a subcontractor.—City of Philadelphia v. Wiggins, Pa., 76 Atl. 31.

87.——Guarding and Lighting Excavations.—Negligence of a street railway company in stopping a car for the discharge of passengers near an open trench in a street held not to relieve contractors excavating the trench from their obligation to so guard the trench as to prevent injuries to passengers alighting from the car.—Gaebler v. Gallo, N. Y., 91 N. E. 787.

88. **Notice**—Constructive Notice.—One cannot shut his eyes to facts which he knows, or should know, and hold one who has innocently been mistaken responsible for resulting injury.—Clarke v. Cooper, Mo., 128 S. W. 47.

89. **Nuisance**—Injunction.—One can only insist upon a degree of quietness in the enjoyment of his property consistent with the standard of comfort prevailing in his vicinity.—Collins v. Wayne Iron Works, Pa., 76 Atl. 24.

90. **Parent and Child**—Loss of Affection of Child.—No action lies by a parent for the loss of the love and affection of a child.—Miles v. Cuthbert, 122 N. Y. Supp. 703.

91. **Partition**—Parol Partition.—A parol partition of real estate, followed by possession taken thereunder, held to vest the equitable title, but not the legal title.—Ater v. Smith, Ill., 91 N. E. 776.

92. **Partnership**—Employment of Partner.—Proof of a plaintiff's employment by his copartner as attorney for an estate of which the partner and a third person were executors held sufficient to establish a prima facie case for plaintiff in an action for his services.—Berkeley v. Dusenberry, 122 N. Y. Supp. 884.

93.——Joint Tort Feasors.—Where defendant, who is a member of a firm, converted a mortgaged mule, the mortgagee was entitled to sue one or both of the members of the firm at his election.—Smoak & McCreary v. Stockwell, N. C., 67 S. E. 994.

94. **Perpetuities**—Gifts for Care of Burial Lot.—A testamentary gift to a religious corporation in trust to apply the income to the care of testator's burial lot is void as involving a perpetuity, unless saved by statute.—Driscoll v. Hewlett, N. Y., 91 N. E. 784.

95. **Powers**—Testamentary Powers.—A testamentary power to sell must be strictly executed when express directions are given.—Hattie v. Gehin, N. J., 76 Atl. 4.

96. **Principal and Surety**—Liability of Surety.—Surety signing bond on condition that another shall sign as co-surety held released on his failure to so sign.—Columbia Ave. Trust Co. v. King, Pa., 76 Atl. 18.

97. **Process**—Substituted Service.—Where suit is brought against a nonresident by substituted service, it must partake of the nature of an action in rem.—Guffey v. Grand Trunk Ry. Co. of Canada, 122 N. Y. Supp. 947.

98. **Quieting Title**—Personal Property. — A complaint to remove a cloud on personal property may be maintained.—Martin & Earle v. Maxwell, S. C., 67 S. E. 962.

99. **Railroads**—Injury to Passengers.—Passengers are in many cases excused from the imputation of negligence where they obey the direction or advice of the trainmen.—Owens v. Atlantic Coast Line R. Co., N. C., 67 S. E. 993.

100. **Reference**—Taking Account After Interlocutory Decree.—Where, in a suit for an accounting by trustees, the answer denied the validity of the trust, the defendant was entitled to have such issue determined prior to ordering a reference.—Starr v. Sellick, 122 N. Y. Supp. 1054.

101. **Release**—Validity.—One able to and having an opportunity to read a release executed by him held charged with knowledge of its contents.—Aderholt v. Seaboard Air Line Ry., N. C., 67 S. E. 978.

102. **Remainders**—Assignment. — An assignment or mortgage of a contingent remainder in land is good, at least in equity.—Martin & Earle v. Maxwell, S. C., 67 S. E. 962.

103. **Sales**—Contracts.—Printed matter on the letter heads of the buyer's letter containing the order for goods held not a part of the contract of sale.—R. J. Menz Lumber Co. v. E. J. McNeeley & Co., Wash., 108 Pac. 621.

104.——Fraudulent Representations.—Where a seller avers the existence of a material fact recklessly, or when ignorant whether it is true or false, he is responsible therefor.—J. I. Case Threshing Mach. Co v. Feezor, N. C., 67 S. E. 1004.

105. **Seduction**—Immediate Complaint.—In a prosecution for seduction, evidence that the prosecutrix did or did not make immediate complaint is not admissible.—Tucker v. State, Ala., 52 So. 464.

106. **Set-off and Counterclaim**—Waiver.—Where tort is waived, the debt may be counterclaimed in an action on contract.—Carroll v. Sharp, 122 N. Y. Supp. 694.

107. **Specific Performance**—Contracts Enforceable.—The contract for which specific performance is prayed must be such that the court can make an efficient decree for its specific performance, and can enforce its decree when made.—Wright v. Suydam, Wash., 108 Pac. 610.

108.——Land Contracts.—A vendor may sue in equity to specifically enforce a contract for the sale of land, though the only way it may be performed by the purchaser is by payment of the price.—Paul v. Swears, 122 N. Y. Supp. 740.

109.——Parties Entitled.—The mortgagor or his vendee held entitled to enforce a provision of the mortgage for release of part of the land on part payment of the mortgage.—Whipple v. Lee, Wash., 108 Pac. 601

110. **Statutes**—Repeal.—Whether a statute, repealed without a saving clause, should be considered as though never existing except as to past transactions held to depend upon the legislative intent.—Commonwealth v. Mortgage Trust Co., Pa., 76 Atl. 5.

111. **Street Railroads**—Regulations.—A general rule of a street railroad company requiring passengers on entering a car to deposit fares in a box held reasonable.—Elder v. International Ry. Co., 122 N. Y. Supp. 880.

112. **Taxation**—Discrimination.—The retroactive features of Ky. Act March 21, 1900, requiring officers of national banks to list its shares for taxation, does not discriminate against the bank contrary to Rev. St. U. S., sec. 5219.—Citizens' Nat. Bank v. Commonwealth of Kentucky, U. S. S. C., 30 Sup. Ct. 532.

113.——Set-Off.—That the owner of taxable property has against the city a debt equal to the taxes due will not prevent the city from collecting the taxes.—Tarver v. City of Dalton, Ga., 67 S. E. 929.

114. **Telegraphs and Telephones**—Refusal of Service.—A telephone company held to have no right to refuse service to a patron because of non-payment of back rent.—Southwestern Telegraph & Telephone Co. v. Luckett, Tex., 127 S. W. 856.

115. **Trade-Marks and Trade-Names**—Fraudulent Use of "Dr." in Name.—The use by one not entitled to the prefix "Dr." of the prefix to his name in connection with his remedies held a fraud on the public—World's Dispensary Medical Ass'n v. Pierce, 122 N. Y. Supp. 818.

116. **Trial**—Taking Statements of Counsel to Jury Room.—Allowing a jury to make calculation by plaintiffs counsel of the amount of damages suffered by breach of warranty in the sale of an engine to the jury room held reversible error.—Fowler Waste Mfg. Co. v. Otto Gas Engine Works, Pa., 76 Atl. 20.

117. **Vendor and Purchaser**—Caveat Emptor.—The rule allowing 5 per cent to cover inaccuracies through variations in instruments and small errors in surveys held not to apply to sales of valuable farm lands by the acre.—Castleman's Adm'r v. Castleman, W. Va., 68 S. E. 34.

118.——Fraud of Vendor.—Where the vendor fraudulently misrepresents to a purchaser the quantity of land conveyed, it is immaterial that the sale was in gross rather than by the acre.—Paul v. Swears, 122 N. Y. Supp. 740.

119.——Sale of Land.—A contract for the sale and purchase of real estate vests in the purchaser the equitable title, and the vendor holds the legal title merely as security for the payment of the price.—In re Edgewater Road in City of New York, 122 N. Y. Supp. 931.

120.——Waiver of Irregularity.—A purchaser's failure to object to a deed tendered by the vendor, on the ground that title thereunder was deraigned through the record owner instead of through the vendor, waived such irregularity.—Backman v. Park, Cal., 108 Pac. 686.

121. **Waters and Water Courses**—Adverse User.—One held to acquire by adverse user the right to the use of waters in a stream formed by springs on the land of another.—Mason v. Yearwood, Wash., 108 Pac. 608.

122. **Wills**—Construction. — The construction of a will will be preferred which vests the title immediately upon testator's death.—Van Deusen v. Van Deusen, 122 N. Y. Supp. 718.

123.——Construction.—The phrase "die leaving no issue" in a will, in the absence of a different intent, imports a general indefinite failure of issue.—Arnold v. Muhlenberg College, Pa., 76 Atl. 30.

124.——Establishment.—Whether a writing was intended as a will may be shown by parol evidence, alone or connection with the writing.—Prather v. Prather, Miss., 52 So. 449.

124.——Intent.—If testator's intent is clearly manifested in the will, and is not violative of some rule of law, it cannot be defeated by technical construction.—Arnold v. Muhlenberg College, Pa., 76 Atl. 30.